

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Rules and Policies on Foreign Participation
in the U.S. Telecommunications Market

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REPLY COMMENTS OF J. GREGORY SIDAK

1. My name is J. Gregory Sidak. I am the F. K. Weyerhaeuser Fellow in Law and Economics at the American Enterprise Institute for Public Policy Research and direct its Studies in Telecommunications Deregulation. I am also a senior lecturer at the Yale School of Management. I served as Deputy General Counsel of the Federal Communications Commission from 1987 to 1989. I am the author or co-author of five books concerning regulated network industries, including *Foreign Investment in American Telecommunications* (University of Chicago Press 1997), a copy of which I submit with these reply comments and incorporate in its entirety herein by reference. My complete professional biography is contained in that book. I file these reply comments in my individual capacity and not on behalf of the American Enterprise Institute, the Yale School of Management, or any client.

2. These comments address only the Commission's proposals concerning indirect foreign investment in radio licensees under section 310(b)(4). My comments are intended to direct the Commission's attention to legal, historical, and economic analysis contained in *Foreign Investment in American Telecommunications* that is relevant to the Commission's proposal to interpret section 310(b)(4) more permissively. I have three points to make.

3. First, the Commission would enhance the welfare of American consumers by adopting its tentative conclusion in paragraph 10 of the Notice that the agency has the discretion

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under section 310(b)(4) of the Communications Act to find that “indirect foreign ownership of common carrier radio licensees up to 100 percent should be presumed to be consistent with the public interest when the foreign investor is from a WTO Member country, absent compelling evidence to the contrary.” Pages 98–100 of *Foreign Investment in American Telecommunications* explain that such an interpretation would be more faithful to the statutory text than the interpretation to which the Commission had adhered before this Notice. Furthermore, as pages 135–36 of *Foreign Investment in American Telecommunications* show, the Commission’s former interpretation of section 310(b)(4) lacked any rational purpose after Congress’s 1996 amendments to section 310(b)(4), which allowed unlimited foreign managerial control of radio licensees.

4. Second, the Department of Defense and the Federal Bureau of Investigation appear to overestimate both the scope and efficacy of section 310(b)(4) as a tool of national security. Chapters 2 and 3 of *Foreign Investment in American Telecommunications* document that both are narrower than is commonly believed. The ineffectuality of section 310(b) became apparent only seven years after its enactment when, in 1941, Imperial Japanese diplomats readily transmitted encoded messages relevant to the imminent attack on Pearl Harbor from the United States to Tokyo over American-owned radio telegraph carriers. Thus, even in the relatively simple technological era in which Congress enacted section 310(b), the foreign ownership restrictions failed to protect America’s national security. The Department of Defense and the FBI are simply not credible today when they purport to put their faith in the same statute that proved itself worthless more than a half century ago.

5. Third, the Commission’s refusal to extend its proposed interpretation of section 310(b)(4) to broadcast licenses would unconstitutionally restrict the freedom of electronic speech. As pages 345–55 and 360–62 of *Foreign Investment in American Telecommunications* explain,

that conclusion follows regardless of whether, for purposes of judicial review, the objective of section 310(b)(4) is considered to be national security *or* trade policy. The Commission must extend its proposed interpretation of section 310(b)(4) to avoid violating the First Amendment.

Respectfully submitted,

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FOREIGN INVESTMENT IN
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